

# Andy's Right to Privacy in Grading and the *Falvo versus Owasso Public Schools* Case

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About six years ago, *The Clearing House* published my article “Who Needs to Know That Andy Got a D?” (Friedman 1996). That was the first time that anyone had discussed the laws and professional standards that apply to the situation in which students are required to announce their grades aloud while the teacher writes them in the grade book. After summarizing the Family Educational Rights and Privacy Act (FERPA), I contended that the law was probably not applicable in classroom settings; rather, it addressed records kept by institutions (i.e. buildings and school districts). As it turns out, I was right—according to the Supreme Court of the United States. I would like to share the history of this case and offer a comment on the outcome.

## FALVO VERSUS OWASSO PUBLIC SCHOOLS

In October 1998, Kristja Falvo filed suit in the U.S. District Court for the Northern District of Oklahoma on behalf of her three children, who experienced the practice of peers grading their schoolwork and announcing their grades aloud as they were recorded by the teacher. Of particular concern was one of her children, who had been identified as having a special educational need; announcing his grades proved humiliating. Prior to filing the lawsuit, she had asked district administrators and teachers to discon-

tinue these practices, but they refused. Thus, she initiated a class action suit against the Owasso, Oklahoma, Public Schools. Wilfred Wright, Falvo's attorney, argued that rights guaranteed by FERPA and the Fourteenth Amendment were being violated.

In April 1999, Judge Terry Kern ruled in favor of the Owasso Public Schools. Karen Long, attorney for the schools, said, “We're pleased that Kern found the way that he did, that there is no privacy when grading” (Cooper, 1999). A letter written in 1993 by LeRoy S. Rooker, director of the Family Policy Compliance Office (FPCO) at the United States Department of Education, was influential; he argued that papers' being graded by other students are beyond the purview of FERPA because the grades are not being maintained by an educational agency or institution. In 1999, Rooker made a sworn declaration for the defense affirming that the letter stated the current position of the FPCO regarding this grading practice. Regarding the claim that Fourteenth Amendment rights were violated, Judge Kern followed a three-part test that has been applied in similar cases. That there is, in fact, an expectation of privacy is the first part of the test; Kern ruled that the case did not pass this test. He did not view the grades in this case as “highly personal” matters worthy of constitutional protection.

## THE APPEALS

Falvo filed an appeal with the Tenth Circuit Court of Appeals in Denver. In his brief on behalf of Falvo, Wright (2000) argued that privacy in grading can be expected under FERPA. “The U.S. Department of Education concurs

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that once the student calls out the grade and it is received by the teacher a legal duty exists not to publicly disclose the information. However, the District Court would allow students call out their test grades. Yet this begs the question: how can the law allow the teacher to publicly disclose the test grade, if upon receipt of the audible grade information, the teacher is under a legal duty not to disclose the information? Falvo maintains that since a legal duty exists to protect the grade information, the teacher cannot require the student to announce that which is protected” (4–5).

The circuit court justices were persuaded, as Justice Murphy (2000) wrote:

The grade the correcting student places on the paper is also “maintained,” because that student is preserving the grade until the time it is reported to the teachers for further use. In sum, the grades which students mark at the teacher’s direction, on each other’s homework and test papers later reported to the teacher are “maintained...by a person acting for [an educational] agency or institution.”

This interpretation of FERPA is consistent with Congress’ intent to protect from disclosure grades in a teacher’s grade book.... This court therefore concludes that the District Court erred when it resolved that the grading practice did not offend FERPA because the grades at issue did not constitute “education records” protected by that statute. (24–25)

This opinion also indicated that because the Rooker letter and declaration “lack sufficient reasoning, fail to account for the breadth of FERPA’s language, and indicate the FPCO’s somewhat cursory and purely hypothetical consideration of the issue before this court, the interpretation of FERPA offered in those documents is not persuasive” (22). However, the district court’s ruling that there was no violation of rights guaranteed by the Fourteenth Amendment was affirmed.

The Owasso Public Schools appealed the circuit court’s decision to the Supreme Court. In support of Owasso, the National Education Association (NEA) and the American Federal of Teachers (AFT) filed an *amicus* brief stating:

NEA and AFT are nationwide employee organizations—with memberships of approximately 2.6 million and one million, respectively. A substantial majority of NEA and AFT members are employed as teachers in public school districts throughout the United States. These members—with the approval of their employing school districts—routinely use the grading practice that is at issue in this case—*i.e.*, the practice of allowing students to grade one another’s homework and quizzes as their teacher goes over the answers aloud in class. (1)

Other educational groups including the National School Boards Association, Oklahoma Education Association, and Reporters Committee for Freedom of the Press wrote briefs on behalf of Owasso. John Krumboltz, a professor at Stanford University, offered the following in his *amicus* brief in support of Falvo:

The vast majority of teachers do not use this harmful practice, but the minority who do use it are taking unnecessary risks with the welfare of children.... Teacher efficiency and performance are actually diminished by the practice because valuable class time is spent recording scores instead of learning new material. Besides, it is neither desirable nor necessary for every student paper to be graded.... Arguments that peer grading is some type of long-standing and honored educational practice are nonsense. There is no evidence in the educational literature that the peer grading described here even takes place in the public schools, let alone that it could have some beneficial consequences.... Clearly the teacher’s grade book is an educational record, not a private diary. (3–4)

The case was argued again in November 2001, with Falvo’s attorney reaffirming the contention that the educational records that are the focus of this case are covered by FERPA, arguing again that records that have been revealed (as students call out their grades) cannot logically be concealed. The attorney for Owasso argued that the record is not maintained until such time that the teacher writes it in the grade book and therefore is not protected.

The Court found in favor of the Owasso Public Schools, 9-0. In delivering the opinion of the Court on February 19, 2002, Justice Kennedy indicated that interpreting educational records to cover classroom work would “impose substantial burdens on teachers across the country” and would “force teachers to abandon other customary practices, such as group grading of team assignments” (4).

For all these reasons, even assuming a teacher’s grade book is an educational record, the Court of Appeals erred, for in all events the grades on students’ papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book. We limit our holding to this narrow point, and not to decide the broader question whether the grades on individual student assignments, once they are turned in to teachers, are protected by the Act.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. It is so ordered. (5)

Case closed, right? Most of the article that I wrote in 1996 focused on professional guidelines that point in a dif-

ferent direction for teachers, and the Supreme Court's decision has not altered that view.

Previously I addressed only the matter of students' announcing their scores. This case also involves "peer grading," which might be judiciously used by teachers in the early stages of learning, for example, peer editors helping each other improve their drafts before the final products are submitted to the teacher. But this would not entail grading at all. Students might be capable of providing formative feedback or perhaps even scoring their peers' minor homework assignments, but only teachers should be grading students. Similarly, a nurse might take a blood pressure reading, but the doctor is the one who evaluates the information. This is an important distinction that should be made in future discussions of these issues; thus I will generally refer to peer grading, which is consistent with the rhetoric used throughout the case, even though I recoil at the idea. Do we really mean to say that students can competently grade each other? If so, what is the teacher's role in the assessment process?

The Court held to a narrow view that might be consistent with the wording of FERPA. But fulfilling one's professional responsibilities is another matter. It has to do with building trust between one who holds power and one who doesn't. It has to do with erring on the side of caution if the professional is not sure how the patient, client, or even student is feeling. It has to do with affording fundamental respect to anyone seeking help. Many teachers have these feelings for their students and truly merit the label "professional." Even after this ruling, they will continue to treat their students as they always have—respectfully. Prior to the decision, many teachers with whom I shared the details of the case reacted with shock—"I thought that was already illegal!"

## ALTERNATIVE ASSESSMENT

The arguments forwarded by Owasso, NEA, and AFT seem to rest on the assumption that these practices are necessary if learning is to occur. Again, some teachers seem to find alternatives. Many of the assignments that teachers now record in their grade books can be treated as opportunities for the students to practice without the worry of being graded. Teachers should explain the reasons for practicing prior to the test. But this should not be too difficult to "sell"; after all, these are numerous real-world examples from which to draw. The student driver, for example, practices extensively before taking the road test and finally obtaining a driver's license. The process of practicing helps learners discover their strengths and weaknesses so that they can improve. This encourages perhaps the best kind of assessment—the ability to self-assess.

Other benefits accrue. Students can feel comfortable learning from their mistakes as opposed to being constantly held accountable in the grade book. Further, it is difficult for teachers to administer high-quality assessments consistently. Although teachers might be gathering a great deal of grading data, what is its quality? Consider student-corrected papers. Was the scoring accurate? If homework assignments are used to help determine the final grade, who actually did the work? If confined to relatively few instances, assessments can be developed that result in reliable scores. Conditions for testing can be controlled, and ultimately teachers can be fairly confident that they have good data on which to base grading decisions. Until we make more extensive use of traditional assessment concepts in the classroom and become better acquainted with their benefits and pitfalls, I will be unconvinced of the need to embarrass students.

And how are all those grades used that many teachers so meticulously gather? In a study in which we were able to interview a group of high school teachers, some interesting perspectives were shared. One teacher lifted her grade book in dramatic fashion and confessed that gathering so much grading data was a source of frustration. She mentioned that the grade book used in her district did not have nearly enough room for all the grades she recorded. We asked: "How do you use all these grades to assign final grades?" Some teachers said that it took a significant amount of time and a calculator. Another "confidently said that she really didn't need all those grades anyway because she could estimate [final] grades and not be off by 'more than half a grade per student'" (Friedman and Truog 1999, 39).

Are schools places where students go to learn or teachers go to teach? Ideally, these should coexist. The NEA and AFT worked with the National Council on Measurement in Education to draft the *Standards for Teacher Competence in Educational Assessment of Students* (1990) which states, "Teachers will be aware that various assessment procedures can be misused or overused resulting in harmful consequences such as embarrassing students [and] violating a student's right to confidentiality..." (32). The position taken by the NEA and AFT in this case appears to run counter to this standard as does Owasso's choice to appeal the circuit court's decision. Their stances seem to align better with the mission statement of the AFT (2000), which emphasizes the welfare of its members; students are not mentioned. Interestingly, though, the *amicus* brief submitted by the NEA and AFT focuses on students' grading each other's work. But this case also involves having students announce their grades aloud. Where do they stand on this, the most reprehensible aspect of the case?

Justice Scalia chided Falvo's attorney at the oral arguments for attempting to elicit sympathy for Falvo's son, who only received 45 minutes of speech therapy each

week. Students should tough it out; it is a rite of passage—the path to manhood. It seems illogical to structure inclusive settings in schools for children with special needs and then treat them in this manner. Are we laying a trap or trying to help?

It is one thing for children to be cruel to each other “on their own time”; it is quite another for schools to sanction it (though many districts provide guidelines for student behavior beyond the school day). Some students will likely feel uncomfortable when the responsibility of grading a peer’s paper is thrust on them or they are asked to announce their grades (see Campbell 1989). Certainly the issues become much more complex if the peer is a friend (or less than friendly) and judgment is involved. Even some very capable students do not wish to make public their academic prowess. This is especially true of students in middle school, who are experiencing changes in so many aspects of their lives that they could do without one more thing to make them feel self-conscious.

How would teachers who choose to subject their students to these practices feel if placed in a similar position? A few years ago, I presented on this topic at the annual meeting of the National Association of Secondary School Principals. At the beginning of the presentation, I handed out a five-item quiz containing questions related to current topics in the news—items that most reasonably attuned citizens should be able to answer. After giving the attendees a few minutes to complete the quiz, I recited the answers aloud asking them to score their own papers. Then I said that I was interested in their performance—“Those that got them all right, please raise your hands.” I paused just long enough to gauge reaction and watch a few nervous glances exchanged. I then announced that this was just an experiment; after all, my topic was “Ethical Issues When Testing and Grading Students.” Why the nervous glances? Even in this relatively trivial assessment setting, I had the sense that I was asking something that had the potential to embarrass someone.

After the district court’s ruling, I asked an attorney for the University of Wisconsin system why, as a college professor, I couldn’t require my students to announce their grades. He said it would probably violate FERPA. When I told him about the ruling, there was a long pause, after which he said that my students simply wouldn’t allow it. For students, perhaps being treated with respect comes with age.

Finally, the Court’s decision probably is consistent with the letter of the law, which was my sense in 1996 based on

a layman’s reading of FERPA. Still, the issues that Falvo’s attorney raised loom large—How can teachers conceal that which has been revealed? The Supreme Court seems to be primarily concerned about the “burdens” placed on teachers. What about the burdens placed on students? These practices might be legal, but they are unprofessional.

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